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In the Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA, APPELLANT

v.

FRED HASTINGS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR APPELLEE

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The Act.

Section 270 of the United States Warehouse Act (Act of August 11, 1916, 39 Stat. 486, as amended March 2, 1931, 46 Stat. 1463, U. S. Code, Title 7, Chapter 10) provides punishment by fine of not more than $10,000 or double the value of the products involved if in excess of $10,000, or imprisonment for not more than ten years or both, of "any person who, without lawful authority, shall * * * remove from a licensed warehouse contrary to this chapter (Chapter 10) or the regulations promulgated thereunder, any agricultural products stored or to be stored in such warehouse and for which licensed receipts have been or are to be issued."

The other provisions of the United States Warehouse Act are not pertinent, except as they throw light upon what is meant by the "licensed warehouse," the removal of goods from which is punished as a criminal offense against the United States.

They provide that a warehouseman, meaning any person or corporation in any State engaged in the business of storing agricultural products under the laws of the State in which located, *may* apply to the Secretary of Agriculture of the United States and the Secretary of Agriculture may, if he finds that the warehouse which such person or corporation is conducting is suitable for the proper storage of the particular agricultural product to be stored therein, issue to such warehouseman a "license;" such warehouseman, upon so applying, giving a bond to the United States to secure the faithful performance of his obligation as a warehouseman under the terms of the United States Warehouse Act and regulations made thereunder, and such additional obligations as may be assumed by such warehouseman under contracts with the persons who store agricultural products with him in such warehouse. After receiving such license the warehouse may be designated as a "bonded warehouse."

There are other provisions authorizing the suspension or revocation of such "licenses," and the warehouseman must issue receipts for agricultural products stored in his warehouse, and must deliver the products stored on demand by the holder of receipts or by any depositor of the products, if such demand is accompanied with an offer to pay the warehouseman's lien, surrender the receipt, and acknowledge delivery.

There are further provisions requiring such licensed warehouseman to make reports to the Secretary of Agriculture and to permit certain inspections by government inspectors. By a later amendment it was provided that the "power, jurisdiction and authority conferred upon the

Secretary of Agriculture, under this chapter, shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect." (Sec. 269 as amended Mar. 2, 1931, c. 366 § 9, 46 Stat. 1465.)

As originally enacted, Section 269 of the Act contained a provision: (Aug. 11, 1916, C313, 39 Stat. 490):

> "Nothing in this Act shall be construed to conflict with, or to authorize any conflict with, or in any way to impair or limit the effect or operation of the laws of any State relating to warehouses, warehousemen, weighers, graders, or classifiers * * *."

This provision was omitted when the Act was amended in 1931.

Again the criminal provision of the Act (Section 270 referred to above), as originally enacted, omitted the provision for punishment of "any person who, without lawful authority shall convert to his own use or use for the purposes of securing a loan *or remove from a licensed warehouse* contrary to this chapter or to regulations promulgated thereunder, any agricultural products stored or to be stored in such warehouse and for which licensed receipts have been or are to be issued." This provision was inserted in the amendment of February 23, 1923, and Section 270 was reenacted March 2, 1931, in substantially the same language, as in the amendment of 1923.

The Indictment.

It was Section 270, above referred to, under which the defendant below was indicted.

The sole charge in the indictment was that the defendant did knowingly, wilfully and unlawfully "remove and steal from and out of" a certain warehouse, naming it, "said warehouse being a duly licensed warehouse * * * under the United States Warehouse Act, * * * a certain bale of cotton," naming it by number, "for which * * * a licensed

warehouse receipt had theretofore been issued * * * contrary to and in violation of the said United States Warehouse Act and the regulations promulgated thereunder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The entire indictment is found at page 1 of the record, and the first count is set forth in the Brief for the United States, pages 3 and 4.

Contention of Appellee.

The contention of the appellee is that it is not within the constitutional power of Congress to make the removal or stealing of cotton or any other agricultural product that happens to be stored temporarily in a warehouse within a State a federal crime, even though the owner of that warehouse has, upon application, received what is called a "license" from the Secretary of Agriculture of the United States, and is authorized to call the warehouse a "bonded warehouse."

The only constitutional provision that has been suggested or we believe can be suggested, as conferring such power on Congress is the power to regulate interstate or foreign commerce. This is not an excise provision, for there is no federal excise tax imposed upon cotton or its warehousing.

That the mere production, manufacture, holding and storing goods, minerals or agricultural products wholly within the borders of a State before shipped or started or committed to be shipped outside the State, are not transactions in interstate commerce or in the current of interstate commerce, is now so well settled by the decisions of this Court from *Coe* v. *Errol*, 116 U. S. 517 to *Schechter* v. *United States*, (No. 854, 864, October Term, 1934) as to require no extended argument, and Congress cannot there-

fore regulate such state business by criminal statutes making offenses against the United States of any violation of such regulations.

The Argument as to Desirability of Safe Warehouses.

No argument as to the desirability of safe and adequate warehouses for agricultural products in the United States, can change the intra-state character of goods and commodities at rest in the States and not started on an interstate journey, or make "interstate" that which is plainly "intra-state."

In the matter of the power of the Federal Government to punish crime, the distinction between what is and what is not interstate commerce, is so clear and fundamental as to require only a suggestion to explain it.

If it is plain that the carriage of stolen goods across state lines is a matter of federal concern and may be punished by the Federal Government, it does not follow that Congress has the power to punish theft of property in every state in the Union where the property is not in interstate commerce but is a part of the mass of property in the State, over which the State alone has jurisdiction, however convenient it might be to have the Federal Government take over the entire subject. To say otherwise is to ignore completely the limitations on federal power fixed and settled in the Constitution.

The Consequences of a Contrary Doctrine.

The consequences of a contrary doctrine are so manifest as to demonstrate the correctness of the proposition for which appellee contends.

If the protection of property which is solely a matter for state concern can be brought under federal power on the assumption that the property is probably destined for shipment outside of the State, because similar property has been so shipped, then federal police power, limited to inter-

state commerce by the Constitution, is extended over a vast field, the limits of which cannot be foreseen, and the commerce clause would be used either to withdraw from the States a great portion of their authority over crimes within their jurisdiction, or, if not so withdrawn, bring about a concurrent punishment for larceny, burglary, and theft, and actually, if not technically, set up a system of double jeopardy in violation of a basic principle of the Bill of Rights.

The following language of this Court in *Schechter* v. *United States*, Nos. 854, 864, October Term, 1934, is even more pertinent to the situation here than it was to the situation in that case:

> "If the commerce clause were construed to reach all enterprises and transactions which would be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government. Indeed, on such a theory even the development of the State's commercial facilities would be subject to federal control."

Distinction Upon Which Appellant Relies.

Counsel for the United States confidently relies upon a claimed distinction between the status of goods before they have become a part of interstate commerce or entered upon the interstate journey, and the status of goods after they have ceased to be a part of interstate commerce and ended their interstate journey.

At Page 23 of brief for the United States, it is said that the *Schechter case* "denied only the existence of congressional power after the goods had reached the State of final destination, and became mingled with the mass of goods therein, and is consequently not inconsistent with congressional power in the present case."

And again, at page 37, it is argued that congressional power to control activities within a State of origin is not inconsistent with the fact that congressional power ceased when goods have reached the State of destination and become mingled with the mass of property within the State.

But no such distinction between the antecedent status which precedes interstate commerce and that which follows its termination, has ever been recognized in the long line of cases from *Coe* v. *Errol*, 116 U. S. 517, to the present day.

There is a time when interstate commerce begins and when interstate commerce ends; when a transaction begins to be a part of interstate commerce, of which alone the Federal Government has jurisdiction, and when it ceases to be such interstate commerce. This was recognized more than a century ago by Chief Justice Marshall in *Brown* v. *Maryland*, 12 Wheat. 419. This is just as true of the flow or stream of interstate commerce as it is of the transportation of particular goods across state lines.

Indeed, it is probable that the doctrine of the extent of state power and the limits of federal power originated with a decision of the question as to when movable property began to enter interstate commerce so as to leave the jurisdiction of the States, rather than the question as to when movable property ceased to be in interstate commerce.

In *Coe* v. *Errol, supra*, it is said:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports *nor are they in process of exportation* nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination or have started on their ultimate passage to that State."

And again in *Arkadelphia Company* v. *St. Louis S.W. Ry. Co.*, 249 U. S. 134, 151, it is said:

> "And the fact that previous experience indicated that 95 per cent. of it (lumber) must be marketed outside of the State, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion."

And again in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, the court used this language:

> "If the possibility or indeed certainty, of exportation of a product or article from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from State jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other States, at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to States other than those of their production."

There are few propositions better settled in the discussion of the powers of Congress under the commerce clause than the one that the production and manufacture, holding and storage of commodities wholly within a State, before they are started on their interstate journey, or contracted to be started on their interstate journey, are not "a part of interstate commerce," and are not "in the flow or stream of interstate commerce."

It was so held by this Court as to the very kind of property and the same kind of a warehouse, with which we are dealing in the case at bar, in two recent decisions of this Court.

In *Chassaniol* v. *City of Greenwood*, 291 U. S. 584, following another case at the same term, *Federal Warehouse and Compress Co.* v. *McLean*, 291 U. S. 17, it is said by Mr. Justice Brandeis, speaking for the court:

> "Ginning cotton, transporting it to Greenwood, and *warehousing*, buying and compressing it there, are each, like the growing of it, steps in preparation for the sale and shipment in interstate or foreign commerce. But each step prior to the sale and shipment is a transaction local to Mississippi, a transaction in intrastate commerce."

This was said of cotton stored in a warehouse licensed under the United States Warehouse Act.

And this is true even though the warehouse is by contract with a railroad company an agent and depot of an interstate carrier.

In the opinion by Mr. Justice Stone, in the *Federal Compress case, supra*, it is said, referring to a warehouse licensed under the United States Warehouse Act:

> "The fact that appellant's contract with the interstate rail carrier has designated appellant as the carrier's agent and appellant's warehouse as the carrier's depot cannot alter the legal consequences of what is actually done with the cotton by its owners or of their power of control over it, or of the actual course of dealing with it by appellant. It is not within the power of the parties, by the descriptive terms of their contract, to convert a local business into an interstate commerce business protected by the interstate commerce clause."

Effect of Licenses.

Nor is the fact that the warehousemen, in whose warehouse the property at rest within the State is stored, is

permitted to apply to the Secretary of Agriculture for what is called a "license" to call himself the operator of a "bonded warehouse" affect the question or change the intra-state character of the property.

Manifestly, it would be an unwarranted extension of the Congressional power to say that the Federal Government can bring within its police powers all movable property in the United States so as to punish as a crime against the Federal Government any unpermitted removal of such property, even contrary to state criminal laws, by the simple expedient of giving to the holder of the property or the bailee of it, some kind of authority or agreement, called a "license" permitting him to say that he was "bonded."

In a broad view of the subject, that would be of substantially the same nature as the plan of the National Industrial Recovery Act (held beyond the power of Congress in the *Schechter Case, supra*) which, by means of codes, did label all business in the United States which came under codes, and did permit all business coming under codes to display the authorization of the now extinct "Blue Eagle" to do business under the sanction of the Federal Government.

Indeed it was a part of the plan of the "NRA" to grant licenses to all business in the United States to engage in interstate commerce as a means of making the codes effective. (Act of June 16, 1933, Chap. 90, 48 Stat. 175, U. S. C. Title 15, sec. 704).

But it was never thought that the license feature or the wings of the "Blue Eagle" converted any transaction or business or property into an "interstate" transaction.

It would be dangerous doctrine, destructive of the separation of powers between the states and the nation, secured by our dual form of government, to hold that those matters and things belonging to the states, with which the Federal Government cannot "meddle"—to use the expression of Mr. Justice Holmes in the dissenting opinion in

Hammer vs. *Dagenhart*, 247 U. S. 251—may be brought within the jurisdiction of the Federal Government merely by a system of "licenses."

We have then the clear conclusion that a warehouse located wholly within a State, receiving goods brought to it from within the State to rest there, and returnable to the owner on demand within the State, the goods in which are not yet started on any interstate journey, and not contracted or committed to be sent on an interstate journey, is not a federal instrumentality and is not in interstate commerce, and the goods stored therein are not in the stream of interstate commerce. The Constitution did not delegate power to the Congress to punish the stealing of such goods.

Cases Cited by Counsel for Appellant.

In all of the cases relied upon by the appellant, where the court has allowed federal regulation antecedent to the point of actual movement in interstate commerce, there has been proof of an actual burden on interstate commerce, or of an intent to restrain and obstruct interstate commerce, or a precedent beginning of the "flow" or "stream of interstate commerce," which flow is not interrupted by a temporary halt.

In *Stafford* v. *Wallace*, 258 U. S. 495, it was held that the Packers and Stockyards Act of 1921 was valid because the cattle at such stockyard was in the stream of commerce among the states and included subordinate activities and facilities which were essential to such movement, and that the stockyards were themselves instrumentalities of such interstate commerce. In the case now before the Court, the cotton stored in the warehouse, as this Court has held in the two recent cases heretofore cited, is not in interstate commerce; the stream of interstate commerce has not begun to flow and the warehouse is not an instrumentality of interstate commerce.

But it is unnecessary to argue the point at length since in the later decisions of this Court, where *Stafford* v. *Wallace* was considered and distinguished, it was made plain by the Court that warehouses of the character of that in the present case were, unlike the stockyards, not instrumentalities of interstate commerce, and the property in them was not in interstate commerce because the stream of interstate commerce had not begun to flow.

So also in the *Schechter Case, supra,* where *Stafford* v. *Wallace* was one of the cases suggested as controlling, this Court distinguished the *Stafford Case* as one involving a practical continuity of movement in the stream of interstate commerce, whereas the handling of poultry intrastate, after it had been shipped in interstate commerce, was not in such stream of commerce because its interstate character had ceased.

So of *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, which rested upon *Stafford* v. *Wallace,* and which was also cited and distinguished in the *Schechter Case, supra.*

In the *Chicago Board of Trade Case,* this Court said "It is impossible to distinguish the case at bar, so far as it concerns the cash grain, the sales to arrive, and the grain actually delivered in fulfillment of future contracts from the current of stock shipments declared to be interstate commerce in *Stafford* v. *Wallace,* 258 U. S. 495."

But in the case now before the Court, the property is not in interstate commerce or in the course of interstate commerce, as held by this Court in the recent decisions referred to.

In *Swift & Company* v. *United States,* 196 U. S. 375, the court was dealing with a conspiracy effectuated by local activities whose direct object was the manipulation of the current of interstate commerce.

The court in *Schechter* v. *United States,* Nos. 854 and 864, October Term, 1934, states the doctrine of the anti-trust cases in the following way:

"Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 310, 45 S. Ct. 551, 69 L. Ed. 963. But, where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions. This principle has frequently been applied in litigation growing out of labor disputes."

• • • • • • •

"While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction."

The *Hallanan Cases,* 257 U. S. 265 and 277 are clearly distinguishable from the case at bar. There the court found from the proof that the oil and gas entered the "flow of interstate Commerce" as soon as it entered the feed lines which opened into the main pipe lines carrying the oil into other states. The opinion states: "The bailor assents to its becoming part of a stream that is pouring through and out of the state" (p. 272). • • • "It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil started and at which it in fact arrived." And the court in the second

case said, (p. 281), "The great body of the gas starts for points outside the state and goes to them. That the necessities of business require a much smaller amount destined to points within the state to be carried undistinguished in the same pipes does not affect the character of the major transportation."

These cases would be analogous if in the case at bar the cotton had been delivered to an interstate carrier destined for points out of the State, but part of it recalled or stopped before leaving the State of its origin and delivered to points within the State. Even here there is a difference, for the oil and gas is carried in the pipes undistinguished, while cotton is never mingled, but sold in individual and identified bales. In the case at bar the cotton has not started on a journey in interstate commerce, nor has it entered a flow or stream of interstate commerce. It may never go into such commerce.

All the grain bought in *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282, as the proof showed, was bought for immediate shipment into Tennessee, and the court found that the Kentucky statute in question, if applied to the facts of the case, would be a burden and obstruction on interstate commerce, for the court found that the buying was a part of interstate commerce as much as the transportation.

The case of *Lemke* v. *Farmers Grain Company*, 258 U. S. 50, was based upon the decision in the *Dahnke-Walker Case, supra*. The Court held a North Dakota statute unconstitutional which sought to license all buyers of wheat and to regulate the weighing and grading, the measure of profit, etc. The Court found, as a matter of fact, that the buying and selling was interstate commerce and that a regulation thereof by the State was a burden on interstate commerce. The proof showed that the grain was purchased, placed into elevators and loaded at once into cars for shipment to Minneapolis and elsewhere outside the State. The Court

did not find that an elevator which was for storage *prior* to sale and shipment was in interstate commerce. In the case at bar, the cotton and cotton warehouses of the character here involved were prior to sale and shipment, were not in interstate commerce and were not a part of interstate commerce, as found by this Court in later cases. Here again, therefore, the cases cited are distinguished by the cases of *Chassaniol* v. *City of Greenwood, supra*, and *Federal Compress & Warehouse Company* v. *McLean, supra*, as well as by the facts of the two sets of cases.

Cases relied upon by the appellant where a common carrier in interstate commerce is involved are obviously distinguishable. Congress has been allowed to deal with intrastate carriers and rates only to the extent to prevent a burden on or obstruction of interstate commerce. Such cases are not here applicable for cotton on storage or cotton warehouses does not obstruct nor burden interstate commerce. In each of the above type of case cited by appellant the court found from proof, as a matter of fact, that such activities did burden or obstruct interstate commerce.

Where the activities did not burden or obstruct interstate commerce, the mere fact that the person or corporation was engaged in interstate commerce, did not subject him or it to all manner of Congressional regulation. To state such a proposition, this Court said, in the *Employer's Liability Cases*, 207 U. S. 463, "is to refute it." Said the Court:

> "It assumes because one engages in interstate commerce, he thereby endows Congress with powers not delegated to it by the Constitution; in other words, with the right to legislate concerning matters of purely state concern. * * * It is apparent that if the contention were well-founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable mat-

ters which, from the beginning, have been, and must continue to be, under their control so long as the Constitution endures."

In *United States* v. *Ferger*, 250 U. S. 199, this court held that the forging and use of false *interstate* bills of lading was within the power of Congress to punish. It was held that bills of lading for the movement of interstate commerce are instrumentalities of that commerce, which Congress had power to regulate. The false bill of lading in that case purported to cover the shipment of corn from one state to another; the spurious bills were in the form of interstate commerce bills, which involved the potentiality of fraud as far-reaching as the flow in the channels of interstate commerce in which it was contemplated the fraudulent bills would circulate. This was certainly an obstruction of interstate commerce. In the case at bar neither the warehouse, the cotton on storage, nor the warehouse receipts are instrumentalities of interstate commerce. The entire transaction involved is prior to any "flow" or "stream" of interstate commerce, and too remote to be a burden, restraint, or obstruction on such interstate commerce.

Appellant urges and advances the theory that the warehouse receipts are instrumentalities of interstate commerce and bring the warehouse and cotton within the power of Congress to regulate. Such a proposition is begging the question. If the warehouse and cotton itself are not within interstate commerce (as this court has held they are not), the mere issuance of a warehouse receipt will not bring them within congressional power. It is only an evidence of title to the stored cotton.

Appellant lays much stress on the fact that bankers lend money with which cotton buyers finance their operations, taking warehouse receipts as collateral for the loans. The mere fact that warehouse receipts might be held as collateral for loans is no justification for Congress exceeding its power under the Constitution.

Loans are made by bankers and financial institutions on mortgages of real estate, personal property, pledges of stocks, bonds, and other security; but the mere fact that such collateral is required before the loan is made, does not subject that collateral to federal regulation, even though the local bank or banker may pledge such with other bankers.

In the case at bar we are dealing with cotton which is alleged to have been stolen and removed by the appellee and an accomplice. It is not alleged that the warehouse receipt covering such cotton has falleh into the hands of any bank or banker, much less that it has passed to some financial center outside of the State. Appellee has as much right to assume that the receipts on the cotton in question are still in the hands of the farmer; but regardless of that, as stated above, the mere fact that the receipt may be used as collateral for a loan is no basis for federal regulation.

Cotton is not bought and sold on warehouse receipts, but each bale is classed individually and sold on samples taken from each bale. The grading of the cotton is not done by the warehouse, but by individual cotton buyers and cotton factors. On the face of each warehouse receipt issued by the warehouse in question there appears in bold letters the fact that the bale of cotton on which the receipt was issued is not graded.

Appellant further stresses the fact that the act requires insurance which in turn makes the receipt more reliable. The insurance is on the warehouse, and not on the cotton stored therein. On the face of each receipt appears the fact that the cotton is not insured. The individual owner of the cotton must carry his own insurance if he wishes to be protected against fire, tornado, floods, etc. The bond is merely for the faithful performance by the warehouseman of his duty to deliver the cotton stored with him to the one presenting the receipt. This is nothing more than any efficient warehouseman does.

The basis for Congressional authority in the case of *Westfall* vs. *U. S.*, 274 U. S. 256, goes back to the case of *McCulloch* v. *Maryland*, 4 Wheat. 316, and the cases following it. Here the conviction of one aiding an officer of a state bank, a member of the Federal Reserve System, to misapply funds of the bank was affirmed. The means used was issuance of a fraudulent certificate of deposit and paying the same from funds of the bank. Congress has power to regulate the Federal Reserve System, and as the court said, (p. 259) "every fraud like the one before us weakens the member bank and therefore weakens the system". Therefore Congress can punish this misappropriation of funds for it was found that such would weaken or burden the Federal Reserve System. In the case at bar the alleged stealing and removal of the cotton does not bear directly, if at all, upon the system of interstate commerce. It is not within the system, nor is the warehouse a member or agency of that system.

Implications of the Government's Contention.

Even if this assumption of federal authority is viewed in its purely practical aspects, it is of some importance whether a citizen, charged with petty larceny, can be tried both by the State and by the United States. Apart from the peril of double jeopardy, and possible double punishment, trial in a Federal Court is not likely to be by a jury of the vicinage. The defendant must go in many cases to a distant forum, and the jury of his peers are not his neighbors who know his character.

We are, however, not chiefly concerned with these purely practical questions. The graver implication of the government's contention is its justification of the expansion of federal police power by the method of licensing. The theory that if the government confers the prestige of its name and authority upon a local enterprise it can assume

all police powers in respect to it, has been slowly developing in this country in the last half century. When the anti-trust agitation was at its height a generation ago, it was then first suggested that the Federal Government could assume complete control over all industrial enterprises by the method of licensing corporations to engage in inter-state commerce. The implications of this project were such that it was not very seriously considered, but in recent years the idea of federal control by the license system has grown amazingly. Under the National Recovery Law the President was given the power to license or refuse to license, and while this was not formally put into effect, yet the provision of the same law, which enabled the Executive not only to approve, but to *impose* a code upon the members of an industry, was in effect an exercise of the so-called licensing power.

Under the Agricultural Adjustment Act the idea was carried into effect, and in the milk trade the Secretary of Agriculture licensed milk dealers, and thus assumed control over them, even if their activities were intra-state. The more recent law, the Potato Control bill contains the same idea, for if put into effect no one can sell potatoes without making application for permission to do so, and if he grows more than five bushels, he is subject to minute governmental regulations, and even if he grows less he must, nevertheless, apply for permission and thus be licensed.

It must be obvious that if every department of the government can require the industrialist, big or little, to become a licensee of the Federal Government, and under conditions that the licensing power may prescribe, our dual form of government in respect to trade and industry is threatened, if not destroyed.

In his Farewell Address, George Washington solemnly warned his and all succeeding generations of Americans that the Constitution could be more easily "undermined" than "directly overthrown." Today the time gives that

prediction proof, and the most effective method of undermining the Constitution is by the doctrine that the Federal Government can usurp the police powers of the States by the simple method of licensing.

If this be conceded, there seems to be no limit to the power of the Federal Government. It can issue licenses to engage in interstate trade, or to use the mails or to make bank deposits, or any other of the normal activities of life. Once recognized as a method of extending the power of the Federal Government, and it will be soon seen how insidious the encroachments will be.

The statute now under consideration was in its first form conservative. It disclaimed any purpose to usurp the police powers of the States. The camel having once lodged its head in the tent, it then proceeded to occupy the tent entirely, and to that end the amendment was passed, which made the federal police power "exclusive," as long as a license was in existence.

The process of supplanting the states in their reserved powers reached a climax when the National Recovery Administration sent the draft of a law to every State and urged its passage, and the vital section of this proposed law was as follows: "Section 2. To effectuate the policies of this Act, the Governor is hereby authorized to consent to the President of the United States utilizing State and local officers and employees in effectuating the policies of the National Industrial Recovery Act in accordance with the provisions of Section 2 (a) of that Act."

It may be that with the centripetal developments of a mechanical civilization, the Constitution is now unworkable in attempting to divide authority between interstate and intrastate activities. We do not concede it, but if such a momentous change is to be made in our form of government, it should be by the orderly process of a constitutional amendment and not by the subtle device of the licensing system.

It is this consideration that gives this case more than ordinary importance. If this Court gives its sanction to the licensing system, a long step will be made to the complete centralization of our government so far as trade and industry are affected.

Defects in the Indictment.

The Court sustained the defendant's demurrer to the indictment upon other grounds, but as these were considerations of general law they are clearly not before this Court on this Appeal. (*United States* v. *Stevenson*, 215 U. S. 190).

Respectfully submitted,

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